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No. 02-1553

In the Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent does not dispute that this Court should grant, vacate, and remand ("GVR") where there exist "'potentially relevant decisions and arguments that were not previously before'" the lower court. Opp. 7-8 (quoting *Stutson* v. *United States*, 516 U.S. 193, 197 (1996)). Her suggestion that this is not such a situation is completely meritless.

This is, indisputably, a case in which the court below:

- approved a 97:1 ratio of punitive to compensatory damages, Pet. App. 29a;

- expressly relied on harms to other Oregonians whose claims were not adjudicated at trial to justify the $79.5 million punitive award, Pet. App. 26a, 30a; and

- upheld the jury's verdict based in part on its sense that the jury "could have believed, in light of defendant's profits, that only a large award would be proportionate to the harm the defendant caused," Pet. App. 31a-32a.

Subsequent to the decision below, this Court held in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 123 S.Ct. 1513 (2003), that:

- "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"; and "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *id.* at 1524;

- "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis * * *," because, among other things, "[p]unishment on these bases creates the

possibility of multiple punitive damages awards for the same conduct * * *," *id.* at 1523; and

- a defendant's wealth is a factor that "bear[s] no relation to the award's reasonableness or proportionality to the harm," *id.* at 1525.

Respondent's specious contention (at 7-8) that *State Farm* offers no significant guidance regarding the law of punitive damages would mean that ***no*** case should be GVR'd for that decision. Opp. 7-8. In fact, however, in the wake of *State Farm* this Court has GVR'd every petition presenting a properly preserved pre-*State Farm* excessiveness challenge – most of which have involved far smaller awards and far lower ratios than the award and ratio at issue here.[1]

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[1] See *Cass* v. *Stephens*, 2001 WL 28092, at *30 (Tex. App. Jan. 11, 2001), *cert. granted and judgment vacated*, 123 S. Ct. 2213 (2003) ($2.5 million award; 25:1 ratio); *Sand Hill Energy, Inc.* v. *Ford Motor Co.*, 83 S.W.3d 483, 496-97 (Ky. 2002), *cert. granted and judgment vacated sub nom. Ford Motor Co.* v. *Smith*, 123 S. Ct. 2072 (2003) ($15 million award; 5:1 ratio); *Romo* v. *Ford Motor Co.*, 122 Cal.Rptr.2d 139, 164-65 (Cal. Ct. App. 2002), *cert. granted and judgment vacated*, 123 S. Ct. 2072 (2003) ($290 million award; 63:1 ratio); *Simon* v. *San Paolo U.S. Holding Co., Inc.*, 2001 WL 1380836, at *10 (Cal. Ct. App. Nov. 7, 2002), *cert. granted and judgment vacated*, 123 S. Ct. 1828 (2003) ($1,705,000 award; 340:1 ratio); *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 272 F.3d 1335, 1347 (Fed. Cir. 2001), *cert. granted and judgment vacated*, 123 S. Ct. 1828 (2003) ($50 million award; 3.3:1 ratio); *Bocci* v. *Key Pharms., Inc.*, 35 P.3d 1106, 1108 (Or. Ct. App. 2001), *cert. granted and judgment vacated*, 123 S. Ct. 1781 (2003) ($57 million award; 45:1 ratio); *Waddill* v. *Anchor Hocking, Inc.*, 27 P.3d 1092, 1094 (Or. Ct. App. 2001), *cert. granted and judgment vacated*, 123 S. Ct. 1781 (2003) ($1 million award; 10:1 ratio); *Textron Fin. Corp.* v. *Nat'l Union Fire Ins. Co. of Pittsburgh*, 2002 WL 1399105, at *15 (Cal. Ct. App. June 28, 2002), *cert. granted and judgment vacated*, 123 S. Ct. 1783 (2003) ($1.7 million award; 10.3:1 ratio). The sole such petition to have been denied is that in *Time Warner Entertainment Co.* v. *Six Flags Over Georgia*, No. 02-978 123 S. Ct. 1783 (2003), a case in which "appellants abandoned any error with respect to a federal constitutional excessiveness claim * * *." *Time Warner Entertainment Co.* v. *Six Flags Over Georgia, LLC*, 563 S.E.2d 178, 184 (Ga. 2002).

Respondent's suggested reasons for treating this case differently are wholly untenable, as we now show.[2]

1. ***Reprehensibility Analysis.*** Respondent's effort to rehabilitate the Oregon court's reprehensibility analysis is futile. The court below never even suggested that the $79.5 million award was appropriate punishment for the effects of petitioner's misconduct on Jesse Williams alone. Rather, and directly contrary to *State Farm*'s holding that punishment cannot be based on harm to persons other than the plaintiff, the court upheld the award because, among other things, it believed that the jury could have found that petitioner's actions "affected ***large numbers of tobacco consumers in Oregon other than Williams***," and that "defendant's products, used as defendant intended them to be used, ***caused a significant number of deaths each year in Oregon*** during the pertinent time period, together with other serious but nonfatal health problems with their attendant economic consequences." Pet. App. 26a (emphasis added). The court also held that it was "appropriate to consider ***the effects of defendant's actions on persons other than Williams*** in determining the amount of punitive damages," and stated that "when the defendant's conduct involves a course of conduct that has affected people other than the plaintiff, the jury may properly consider ***the effect of that conduct on those other people***." *Id.* at 30a, 31a (emphasis added).

Clearly unable to justify the gargantuan award as punishment for Williams' claims alone, respondent cannot

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[2] Respondent makes the baseless assertion (Opp. 8-9) that a GVR in this case might spur an avalanche of petitions that somehow would overwhelm this Court. Neither efficiency nor justice is served by denying lower courts the opportunity to consider and apply intervening decisions of this Court that, like *State Farm*, are likely to alter the result of a case. In any event, the class of cases that are eligible for *State Farm* GVRs – those in which a punitive damages decision became final before *State Farm* came down but as to which the 90-day cert.-filing deadline has not yet run or has been extended – is self-evidently a small one.

help but take a similar approach, arguing that a GVR is not warranted because "Philip Morris's cigarettes kill an estimated 200,000 Americans each year." Opp. 12. As did the Court of Appeals, respondent treats this case as a quasi-class action, in which petitioner is being punished for harms suffered by all Oregonians resulting from cigarette smoking.

The effort by respondent and the Court of Appeals to punish petitioner for all Oregon harms caused by tobacco usage runs headlong into constitutional prohibitions set forth in *State Farm*. The claims of other Oregon smokers were not adjudicated in this proceeding; indeed, the record does not even contain mortality figures for Oregon or, more importantly, any evidence of the number of Oregon smokers who could establish that they were injured as the result of petitioner's alleged fraud. "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis * * *." 123 S. Ct. 1523. Yet that is plainly what happened here. See also *ibid.* ("A defendant should be punished for the ***conduct that harmed the plaintiff***, not for being an unsavory individual or business.") (emphasis added).

Punishment thus cannot be justified by simple reference to the deaths that result from smoking. There is absolutely no evidence in the record of how many people other than Jesse Williams – if any – smoke because false statements by petitioner led them to disregard the Surgeon General's warnings and other information about the hazards of smoking. In fact, as experience, common sense, and legal authority[3] confirm, the dangers of smoking have long been widely known, and for all kinds of reasons not attributable to any fraud by petitioner, many people who know that smoking

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[3] See, *e.g.*, *Soliman* v. *Philip Morris, Inc.*, 311 F.3d 966 (9th Cir. 2002); *Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir. 1996).

causes cancer and other diseases nevertheless begin or continue to smoke. General mortality statistics and the like therefore cannot form the basis for punishment in this case.

Indeed, respondent's denials notwithstanding, the Oregon court's reliance on deaths from smoking generally can be understood only as a decision to enhance petitioner's punishment due to the harms caused by its sale of an inherently dangerous but legal product. *State Farm* confirms, however, that punishment for lawful conduct is improper. See 123 S. Ct. at 1522-23. We noted this critical point in our petition (at 7-8), yet respondent says not a word about it. Rather, she finds herself forced by the disproportionate award to embrace – even in the very first paragraph of her brief – precisely the approach that *State Farm* rejected: "Jesse Williams died ***as a result of Philip Morris's lethal fraud***, along with approximately 400,000 fellow Americans who die ***as a result of tobacco usage*** each year." Opp. 1 (emphasis added); see Opp. 11-13.

That approach is all the more improper because the jury in this case expressly ***declined*** to impose punitive liability on respondent's negligence counts, *i.e.*, the claims alleging that cigarettes are defective and unreasonably dangerous. It voted to award punitive damages for fraud only (and a novel fraud theory at that). Moreover, any assumption that one jury's liability finding fairly supports a conclusion that all sick smokers necessarily were tort victims would be entirely unwarranted. In 2003, for example, verdicts have been returned in a total of seven lawsuits by individual smokers seeking to hold Philip Morris liable for their illnesses. Six of these trials – each of which involved essentially the same allegations, documents, and even expert witnesses as this one – resulted in defense verdicts.[4] It would be the height of

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[4] *Reller* v. *Philip Morris Inc.*, No. BC 261796 (Cal. Super. Ct., Los Angeles Cty.); *Welch* v. *Brown & Williamson Tobacco Corp. et al.*, No. 00-209292 (Mo. Cir. Ct., Jackson Cty.); *Allen* v. *R.J. Reynolds Tobacco* (cont'd)

unfairness to nullify those juries' findings by allowing respondent to recover punitive damages as if she had proven that all smokers have been the victims of a tort. *State Farm* teaches that this type of one-way ratchet is impermissible.

Finally, respondent suggests that *State Farm* is inapposite because this case involves physical injury and death. Opp. 9-14. But there is no "physical injury exception" to the constitutional strictures set forth in *State Farm*. Nor is there any conceivable basis for any such distinction: the Constitution protects against unfair deprivation of property regardless of the characteristics of the underlying tort.[5]

2. ***Ratio Analysis.*** *State Farm* holds that, at least when compensatory damages are substantial (as here), even a ratio of 1:1 "can reach the outermost limit of the due process guarantee." 123 S. Ct. at 1524. And this Court reiterated in *State Farm* that as a general matter a ratio of 4:1 would be "close to the line of constitutional impropriety." See *ibid.* Ratios of between 4:1 and 9:1 are reserved for cases in which egregious conduct is coupled with low compensatory damages. The ratio here, of course, is a staggering 97:1. That figure speaks for itself and cannot be approved after *State Farm*.

In an effort to make the ratio seem smaller, respondent again relies inappropriately on harm to others. She also adds to the mix a fallacious claim that this Court approved a 526:1

(... cont'd)

Co. et al., No. 01-4319-Civ.-King (S.D. Fla.); *Inzerilla* v. *Philip Morris Inc.*, No. 11754/96 (N.Y. Sup. Ct., Queens Cty.); *Lucier* v. *Philip Morris USA Inc.*, No. 02ASO1909 (Cal. Super. Ct., Sacramento Cty.); *Carter* v. *Philip Morris USA, Inc.*, No. Aug. Term 1999 – 4567 (Pa. Commw. Ct., Philadelphia Cty.).

[5] Thus, three of the cases that this Court GVR'd in light of *State Farm* (cited in note 1, *supra*), – *Smith*, *Romo*, and *Waddill* – involve wrongful death and other personal injury claims.

ratio in *TXO Production Corp.* v. *Alliance Resources, Corp.*, 509 U.S. 443 (1993). See Opp. 15. As respondent surely is aware, however, "in *TXO* * * * the relevant ratio was not more than 10 to 1" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 581 (1996)), and probably considerably lower (see *TXO*, 509 U.S. at 462).[6]

Respondent also contends (Opp. 17-18) that, because wrongful death compensatory awards may understate the magnitude of the actual harm, normal ratio constraints should be deemed inapplicable. In so arguing, however, respondent obscures the true nature of the authority on which she principally relies. That article notes that where (unlike here) the victim is a child or a non-working spouse, wrongful-death damages undervalue a decedent's life. But the authors go on to explain that, "[i]f compensatory damages are too low in personal injury cases, they should be raised appropriately. Punitive damages should not be awarded to correct for inadequate compensatory damages * * *." Polinsky & Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 942 (1998). Like the *State Farm* Court, Polinsky and Shavell are firmly of the view that, as a general rule, compensatory damages are adequate to accomplish optimal deterrence. *Id.* at 877-87. They do not suggest that inflated ratios should be used to account for any shortcoming in the system's ability to value damages in wrongful-death cases.

3. ***Significance of a Defendant's Wealth.*** That the Court of Appeal's treatment of wealth is inconsistent with *State Farm* is clear from a simple juxtaposition of the two cases' holdings on the question. The court below stated that the jury "could have believed, ***in light of defendant's profits***,

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[6] The defendant in *TXO* indeed did argue that the ratio was 526:1. See 509 U.S. at 459. The plurality, however, ***rejected*** that view of the case, upholding the award only after determining that the relevant ratio was between 1.1 to 1 and, at most, 10 to 1. See *id.* at 462.

that ***only a large award would be proportionate to the harm*** the defendant caused," Pet. App. 31a-32a (emphasis added). That is, of course, a *non sequitur*, as this Court recognized when it explained in *State Farm* that the Utah Supreme Court had improperly relied on several premises, including "reference to [State Farm's] assets," which "***bear no relation to the*** award's reasonableness or ***proportionality to the harm***." 123 S. Ct. at 1525 (emphasis added). Respondent suggests (Opp. 21) that "profits" are somehow meaningfully different from "wealth," but she does not explain why that would be. Moreover, the court below relied on the entirety of petitioner's profits for a 40-year period (rather than profits earned from defrauding Jesse Williams or even derived from fraud in Oregon); such a plainly irrelevant number cannot form a proper basis for punishment. A GVR is clearly appropriate in light of *State Farm*'s explicit rejection of the very approach to petitioner's finances taken by the Oregon court.

4. ***Jury-Instruction Claim.*** The Court of Appeals held that the reasonable-relationship instruction tendered by Philip Morris was infirm because it would have told the jury not to punish for harms to non-parties. Pet. App. 22a-23a.[7] *State Farm* demonstrates beyond debate that the proposed instruction was not only correct, but required.

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[7] Philip Morris asked that the Court instruct the jury as follows:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable conduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit.

Respondent states that the requested instruction "was confusing, and self-contradictory" (Opp. 15 n.6), but nowhere explains what was "confusing" or "self-contradictory" about it. If, however, she is referring to the instruction's distinction between "consider[ing]" harm to others and punishing for it, it is she who is confused, for that distinction anticipated *State Farm* precisely. See 123 S. Ct. at 1521-22. The simple fact is that the proposed instruction was rejected because Oregon law ***does*** permit punishment for harm to non-parties. See Pet. App. 23a (applying *Parrott* v. *Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001)). Under *State Farm*, however, that aspect of Oregon law must give way. Petitioner was entitled to the requested instruction and is now entitled to have the matter reconsidered in light of the intervening *State Farm* decision.[8]

5. ***Rational Juror Standard.*** Respondent appears to concede that a "rational basis" standard of review would be unconstitutional. See Opp. 23-24. She suggests, however, that we have illegitimately "transmogrif[ied] the 'rational juror' standard into the 'rational basis' test," and she defends the former as consistent with this Court's precedents. But the characterization of Oregon's "rational juror" test as a "rational basis" standard comes from the Oregon Supreme Court, which has equated Oregon's "rational juror" standard with a test that asks "whether 'a rational basis' exists for the particular amount of punitive damages assessed." *Oberg* v. *Honda Motor Co.*, 888 P.2d 8, 11 (Or. 1995). Certainly after *State Farm*, a rational basis standard – which, in ***respondent's*** words, is a "highly deferential test that forbids only utterly arbitrary decisions and permits the [c]ourt to

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[8] Respondent's waiver argument on this point (Opp. 15 n.6) is entirely unfounded. Petitioner contended to the Court of Appeals that the instruction was necessary because, without it, the remaining instructions did not "adequately convey the constitutional standards that must guide the jury's discretion in awarding punitive damages." Philip Morris's Respondent's Br. and Op. Br. on Cross App. at 47-48.

imagine a legitimate rationale, unanchored by evidence or empirical data," Opp. 23-24 (internal quotation marks omitted) – cannot survive. A GVR is therefore required.

6. ***Preemption.*** Respondent's primary response to petitioner's preemption argument is an unfounded claim of waiver. In the trial court Philip Morris argued that a "false impression" theory of fraud would be preempted by the Labeling Act because it is, in essence, a claim of fraudulent concealment. See Philip Morris' Respondent's Br. and Op. Br. on Cross-App. at 28-31. The Court of Appeals agreed that "plaintiff may not base her fraud claim on allegations that defendant fraudulently concealed information concerning smoking and health. She is limited to allegations of affirmative misrepresentations." Pet. App. 6a-7a. Nevertheless, the court adopted respondent's false impression theory in toto. And in its Petition for Review to the Oregon Supreme Court, Philip Morris argued that the "false impression" theory of fraud adopted by the Court of Appeals is preempted by the Labeling Act. Petition at 17-18. There thus is no justification for respondent's waiver claim.

As to the merits, respondent simply asserts, as if saying it makes it so, that this was not a "false impression" case. Opp. 27. But as discussed in the petition (at 16-17), that is precisely how this case was tried and reviewed. The decision below thus conflicts with the Fifth Circuit's decision in *Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir. 1996).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for consideration in light of *State Farm*. Alternatively, the Court should grant plenary review.

Respectfully submitted.

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